

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DEFENDERS OF WILDLIFE,
et al.,

Plaintiffs,

v.

SUSAN MARTIN, *et al.*,

Defendants

v.

IDAHO STATE SNOWMOBILE
ASSOCIATION, *et al.*,

Defendant-Intervenor-Cross
Claimants.

NO. CV-05-248-RHW

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

A bench trial was held in the above-captioned matter from February 12 to February 14, 2007, in Spokane, Washington. Lauren Rule, Michael Leahy, and Richard Eichstaedt appeared on behalf of Plaintiffs; Joseph Kim and S. Jay Govindan appeared on behalf of Defendants; and Paul Turcke and Robert Caldwell appeared on behalf of Defendant-Intervenors. These findings constitute the Court's final findings of fact and conclusions of law on the issues presented at trial as required by Federal Rule of Civil Procedure 52(a).

PROCEDURAL HISTORY

In their Complaint, Plaintiffs challenge two biological opinions issued by Defendants Martin and the U.S. Fish and Wildlife Service ("FWS" or "Service"), and actions by Defendants McNair and U.S. Forest Service ("USFS"), in violation

1 of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1536 and 1538. The
2 Complaint alleges Defendants are allowing the decline of the remaining woodland
3 caribou in the continental United States by implementing National Forest
4 management actions.

5 The Court granted Plaintiffs’ first Motion for Preliminary Injunction by
6 Order on December 20, 2005 (Ct. Rec. 65). Plaintiffs’ motion was narrow in
7 scope, asking for an order enjoining Federal Defendants from implementing their
8 Challenge Cost Share Agreement (“CCSA”) for snowmobile trail grooming in
9 certain areas of the Idaho Panhandle National Forest during the winter of 2005-
10 2006. The Court granted the motion, finding that the CCSA was an agency action
11 under § 7(a)(2) of the ESA which required consultation with the Fish and Wildlife
12 Service before implementation (Ct. Rec. 65).

13 The Court next granted a stipulation filed by Defendants and Intervenor
14 dismissing Intervenor’s cross-claims against Defendants (Ct. Rec. 123).

15 Subsequently, the Court denied Plaintiffs’ second motion for partial
16 summary judgment and granted that of Defendants. Those motions involved issues
17 surrounding the USFS’s duty to consult under § 7(a)(2) of the ESA, and
18 Defendants re-initiated consultation before the Court considered the motions
19 rendering those issues moot (Ct. Rec. 126). However, in the same order the Court
20 granted Plaintiffs’ second motion for injunctive relief, which asked the Court to
21 issue an injunction to prohibit the Federal Defendants from authorizing
22 snowmobiling or snowmobile trail grooming in the “Caribou Recovery Area”
23 inside the IPNF until it had adequately *completed* consultation with the Fish and
24 Wildlife Service over the effects of these activities on woodland caribou (Ct. Rec.
25 126).

26 More recently, after receiving proposals from Plaintiffs and Defendants
27 regarding the proper scope of the injunction, the Court modified the scope of the
28 injunction by adopting Defendants’ most narrow proposal (Ct. Rec. 140). This

1 proposal permitted snowmobiling in limited areas of the Caribou Recovery Area in
2 the IPNF in accordance with a plan developed by Forest Service and Idaho Fish
3 and Game experts. After the Court modified the injunction, Plaintiffs filed a
4 motion to reconsider, asking the Court at least to prohibit snowmobiling in the
5 Smith and Beaver Creek drainages and in the Trapper Burn play area of the IPNF.
6 The Court denied that motion but decided that the best resolution of this issue was
7 to hear the evidence. Therefore, the Court scheduled a bench trial on the issue of
8 whether Defendants violated § 7 and § 9 of the ESA by permitting snowmobiling
9 in the IPNF, and, if so, to determine the scope of any injunction (Ct. Rec. 149).

10 The last motion the Court decided was Defendant's request to limit the scope
11 of the evidence presented at trial to the Administrative Record. Defendants argued
12 the proper procedural posture to decide the issues before the Court was through
13 motions for summary judgment, and that the Court should be limited by the APA
14 to considering the Administrative Record when determining whether the agency is
15 violating the ESA. Consistent with the Court's earlier orders considering this
16 issue, the Court ruled that Plaintiffs' current claims are brought under the citizen
17 suit provision of the ESA, not the APA, and the Court may in its discretion
18 consider materials outside the administrative record. *See Wash. Toxics Coalition v.*
19 *EPA*, 413 F.3d 1024, 1034 (9th Cir. 2005).

20 FINDINGS OF FACT

21 The Selkirk Mountains woodland caribou is listed as "endangered" under the
22 ESA. 50 C.F.R. § 17.11. At the time of listing in the early 1980s, the woodland
23 caribou's population in the United States was reduced to only 25-30 animals. (Fish
24 & Wildlife Service Admin. R., at 00019 (hereinafter "FWS AR")). Since 1987,
25 103 caribou have been transplanted into the region from other populations in
26 British Columbia to bolster numbers and help stabilize the population. (*Id.*).
27 Nevertheless, its remaining population numbers between 35 and 45 animals with
28 most of the population located in southern British Columbia. In its 2001 Amended

1 Biological Opinion, the Service recognized that this population “is considered to
2 be in decline and in danger of extirpation,” and the Court agrees. (*Id.*). Experts for
3 both Plaintiffs and Defendants agreed with this assessment, noting that the current
4 population, although it has remained stable over the last several years, is not large
5 enough to guarantee the species’s survival. Only a few caribou are likely to be
6 found anywhere south of the Canadian border—the Idaho Fish and Game
7 Department has found one to three caribou in several different areas of the Selkirk
8 Mountains during surveys of northern Idaho over the last five years. (Forest
9 Service Admin. R. D220, at 2 (hereinafter “USFS AR”)). Expert testimony
10 revealed caribou and signs of caribou have been spotted during winter aerial
11 surveys near Snowy Top just south of the Canadian border and in the Abandon
12 Creek and Selkirk Crest area since 2000. (Exs. 36(a)-(e)).

13 The woodland caribou’s habitat changes seasonally based in part on food
14 availability and optimal predator avoidance, along with other biological factors.
15 The seasonal habitats relevant in this matter are Early Winter, the habitat occupied
16 roughly from November to mid-January, and Late Winter, where caribou are
17 located roughly from mid-January to April or May. During Early Winter,
18 woodland caribou are fairly active and generally make vertical movements
19 between open- and closed-canopy forests along slopes depending on snow
20 conditions. In Late Winter, caribou take advantage of the consolidation of the
21 snow pack and their unique anatomy—dinner-plate sized hooves—to move up in
22 elevation mostly to avoid predation. Their movements at that time are horizontal
23 along ridge lines, and they generally follow the height of the land. During Late
24 Winter, woodland caribou feed on nutrient-poor arboreal lichen found above the
25 snowline on mature and old-growth trees. The caribou suffer from a nutritional
26 deficit in Late Winter and typically move slowly to conserve energy, spending
27 much of their time bedded down to minimize their net energy loss. A nutritional
28 deficit means that the caribou use more energy than they consume in the Late

1 Winter and come out of the winter in a depleted condition.

2 Although no critical habitat has been designated for the population of
3 woodland caribou, a caribou recovery plan was developed in 1985 and revised in
4 1994. (FWS AR, at 00017). The recovery area outlined in the plan encompasses
5 approximately 2200 square miles in the Selkirk Mountains of northern Idaho,
6 northeastern Washington, and southern British Columbia. (*Id.*). About 53 percent
7 of the recovery area is within the United States, and about 57 percent (175,000
8 acres) of this area is within the IPNF. (*Id.* at 00017, 00049). After the 1994
9 revision of the Caribou Recovery Plan, USFS closed a 25-square-mile area of the
10 IPNF including the Selkirk Crest to snowmobile access to assist in caribou
11 recovery. (*Id.* at 00057; USFS AR D220, at 2).

12 There are groomed trails and snowmobile “play areas” throughout the
13 Selkirk Mountains, including areas close to and in caribou habitat on federal, state,
14 and private land. In its IPNF 2001 Amended Biological Opinion (“BiOp”), the
15 Fish and Wildlife Service states “[m]uch of the late winter habitat available for
16 caribou is being increasingly impacted by winter recreational activities (i.e.
17 snowmobile activity). . . . As the remaining suitable late winter habitat is
18 increasingly infringed upon by winter recreationists, the potential increases for
19 caribou harassment and possible injury, as well as displacement from these key
20 habitats.” (FWS AR at 00021 (citation omitted)). The experts testifying at trial all
21 agreed that interactions between snowmobiles and caribou should be avoided if
22 possible, and defense expert Timothy Layser testified that he would immediately
23 restrict snowmobiling in an area if caribou tracks were spotted in the vicinity.

24 While the impact of interaction between caribou and snowmobiles depends
25 on a number of factors, the generally weakened condition of caribou in the Late
26 Winter presents a significant threat to survival of caribou. The Late Winter is the
27 period before the birth of calves. Stress during this period of time can cause loss of
28 the fetus. Displacement of caribou from familiar forage can cause deterioration of

1 the health of the weakened animals. Caribou benefit from the isolation provided
2 by high terrain during the late winter because predators generally cannot reach the
3 caribou because of the snow conditions. Snowmobiles are not constrained by the
4 snow conditions and can and do reach the high elevations favored by caribou.
5 Snowmobiles in this proximity displace caribou in the same manner as predators,
6 defeating in part the purpose of the caribou's choice of high elevations to survive.

7 Before this suit commenced, approximately 77,000 acres within the caribou
8 recovery area were used by winter recreationists, including snowmobilers. (USFS
9 AR D220, at 2). There were about 50 miles of groomed snowmobile routes
10 mapped and permitted on national forest lands within the recovery area. (*Id.*).
11 Although the actual area used by snowmobiles varies depending on snowfall and
12 snow conditions, aerial monitoring over the past several years has shown an
13 increasing level of use within areas such as open canopied timbered habitats. (*Id.*).
14 The Forest Service reports this type of use was rare in the past. (*Id.*). This use
15 appears to directly overlap the late winter caribou habitat described in the 2001
16 IPNF Amended BiOp—"mature and old growth spruce-subalpine fir forests and
17 parkland." (FWS AR, at 00018).

18 Studies have consistently found caribou presence in areas frequented by
19 snowmobiles decreases and recommend that snowmobiling be restricted from high
20 quality mountain caribou winter habitat or at least limited to a small proportion of
21 the total high quality habitat for each herd. (Exs. 4, 5, & 6). These findings have
22 been confirmed by first-hand observations of caribou behavior after interactions
23 with snowmobiles in the IPNF. In the 1990s, snowmobile-caribou interactions led
24 to the Forest Service's closure of the Selkirk Crest area, and as recently as 2004
25 Forest Service Wildlife Biologist Layser received a credible report of a sighting of
26 two caribou that were "bumped" out of the Abandon Creek area during Late
27 Winter by snowmobiles in the area. (Ex. 25).

28 A corridor permitting consistent travel between the northern and southern

1 parts of the Caribou Recovery Area is critical to survival of the herd. Plaintiffs'
2 expert Keith Simpson and other experts testified to the importance of protecting
3 caribou travel routes between southern areas and northern areas. The experts
4 agreed maintenance of a travel corridor is critical to maintain the genetic linkage
5 within the population. The experts disagreed on the necessity of maintaining a
6 travel corridor throughout the Late Winter season at this time, however. Simpson
7 notes that the USFS's current snowmobile plans allow for snowmobile use that will
8 block movement between high quality habitat on the Selkirk Crest in Idaho and
9 habitat to the north and in Canada. Defense experts generally testified that,
10 considering the current status and location of the population within the United
11 States, a travel corridor linking the Selkirk Crest and points farther north was not
12 vital at this time. Defense experts were careful to limit this assessment to the short
13 term, universally stating that the long term recovery of the species would likely
14 require more restrictions and greater access through the travel corridor. Defense
15 experts also disputed the propriety of the placement of the travel corridor through
16 the southwestern edge of the Trapper Burn area within the IPNF. They stated this
17 followed the height of land, which caribou generally travel in late winter, but that
18 the area did not contain suitable late winter habitat due to the recent burn. In other
19 words, defense experts agreed with Plaintiffs' experts that a travel corridor linking
20 the Selkirk Crest to points north was vital to the long term recovery of woodland
21 caribou, but they did not agree that it was vital at this time or that the corridor was
22 necessarily located where the Forest Service and the FWS have mapped it.

23 The Court finds that a travel corridor is necessary for the survival and
24 viability of the woodland caribou during the entire year. Although this ruling is
25 limited in scope to the time Defendants take to complete consultation and develop
26 a winter recreation strategy in compliance with the ESA, the Court finds that
27 Defendants' distinction between long and short term planning for recovery is not
28 persuasive and does not adhere to the institutionalized caution mandate of the ESA.

1 Considering the regrettably small number of caribou remaining in the United
2 States, small losses to the population in the short term could more easily lead to
3 extinction after the consultation process is complete. *See Defenders of Wildlife v.*
4 *EPA*, 420 F.3d 946, 978 (9th Cir. 2005) (discussing potential harms to pygmy
5 owls, which records suggest numbers less than 100 in area under consideration).
6 The animals that remain in the southern part of the habitat are the progeny of
7 caribou that have retained the instinct to migrate north and south. The continuation
8 of the travel of these few animals from north to south is critical to survival of the
9 herd. Having no other evidence regarding the location of the travel corridor, the
10 Court finds it is located along the height of land that divides the Priest River from
11 the Kootenai River, commonly known as the Selkirk Crest. This is the location
12 identified on maps and exhibits presented by both Plaintiffs and Defendants
13 throughout this litigation.

14 The Court further finds that the areas of prime winter habitat closed by the
15 present injunction are necessary to the survival of the remaining herd. Caribou
16 move in unpredictable patterns for considerable distances during the Late Winter.
17 The presence of snowmobilers in the areas identified by the Forest Service as
18 prime winter habitat threatens the survival of the remaining herd because caribou
19 use the areas that were not previously closed to snowmobile traffic.

20 CONCLUSIONS OF LAW

21 In the parties' pretrial stipulation, Plaintiffs identified the following three
22 claims to be presented and decided at trial, limited to the Forest Service's
23 management of the IPNF:

24 (1) ESA § 7(a)(1)—Defendant IPNF is violating ESA § 7(a)(1) by failing to
25 develop and carry out a program for the conservation of the woodland
26 caribou;

27 (2) ESA § 7(a)(2)—The IPNF is violating ESA § 7(a)(2) by authorizing
28 snowmobiling and trail grooming without insuring that these activities will

1 not jeopardize the woodland caribou; and

2 (3) ESA § 9—The IPNF is violating § 9 by authorizing snowmobiling and
3 trail grooming that causes take of caribou through harm and harassment.

4 The Court has kept in mind that it has two tasks that, although significantly
5 intertwined in an evidentiary sense, have been considered separately. First, the
6 Court determines Defendants' liability under the ESA § 7 and § 9 (whether an
7 injunction is appropriate). Second, the Court determines the proper scope of
8 injunctive relief.

9 **A. ESA § 7(a)(1)**

10 This is the only legal claim the Court has not seen previously in this
11 litigation. Section 7(a)(1) of the ESA states that all federal agencies shall "utilize
12 their authorities in furtherance of the purposes of this chapter by carrying out
13 programs for the conservation of" listed species. 16 U.S.C. § 1536(a)(1). "The
14 key term in [this] section, 'conservation,' means 'to use and the use of all methods
15 and procedures which are necessary to bring any endangered species or threatened
16 species to the point at which the measures provided pursuant to [the Act] are no
17 longer necessary.'" *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*,
18 898 F.2d 1410, 1416 (9th Cir. 1990) (quoting ESA § 3(3), 16 U.S.C. § 1532(3)).
19 The Ninth Circuit recognizes that agencies have an affirmative obligation to
20 conserve under § 7(a)(1). *Id.* at 1416-17. However, the agency has discretion to
21 decide how best to fulfill that mandate to conserve. *Id.* at 1417.

22 Plaintiffs argue that Defendants therefore have an affirmative duty not only
23 to forestall the extinction of a species, but also to allow a species to recover to the
24 point where it may be de-listed. *See Gifford Pinchot Task Force v. U.S. Fish &*
25 *Wildlife Svc.*, 378 F.3d 1059, 1070 (9th Cir. 2004). In the context of a case
26 regarding the designation of critical habitat for a listed species, the Ninth Circuit
27 found that Congress clearly intended "that conservation and survival be two
28 different (though complementary) goals of the ESA." *Id.* The court explained that

1 “conservation” “‘is a much broader concept than mere survival’” and that the
2 ESA’s definition of “conservation” “‘speaks to the recovery of a threatened or
3 endangered species.’” *Id.* (quoting *Sierra Club v. U.S. Fish & Wildlife Svc.*, 245
4 F.3d 434, 441-42 (5th Cir. 2001)). Plaintiffs argue that Defendants’ current focus
5 is simply on maintaining the population of existing animals, and that this falls far
6 short of the conservation mandate in § 7(a)(1).

7 Defendants assert that conservation measures are “voluntary measures that
8 the Federal [action] agency has the discretion to undertake to avoid or reduce
9 adverse effects of a proposed action that otherwise complies with the provisions of
10 section 7(a)(2).” (Ct. Rec. 158, Defs.’ Trial Br., at 2) (quoting 51 Fed. Reg. 19926,
11 19931 (June 3, 1986)). The section of the Federal Register quoted by Defendants
12 discusses the definition of “conservation recommendations” in the expert agencies’
13 rules, and it “explains the [FWS]’s role in *helping* [action] agencies meet their
14 section 7(a)(1) responsibilities.” 51 Fed. Reg. 19926, 19931 (emphasis added). It
15 also states that “[e]ach Federal [action] agency has the responsibility to implement
16 its authority under section 7(a)(1).” *Id.* at 19929. The fact that the ESA “does not
17 mandate particular actions to be taken by Federal [action] agencies to implement
18 7(a)(1)” does not mean that action agencies do not have any mandate under §
19 7(a)(1). *Id.* at 19934. Indeed, § 7(a)(1) authorizes action agencies “to factor
20 endangered species conservation into their planning processes, regardless of other
21 statutory directives.” *Id.*

22 Defendants are correct in their assertion that § 7(a)(1) does not provide any
23 mechanism for applying its very broad goals to particular circumstances involving
24 particular species, and it does not mandate any particular actions, as opposed to §
25 7(a)(2) with its very specific consultation requirement. *See id.* Because the
26 requirements of this section are quite vague and left entirely up to the agency’s
27 discretion, the best lens through which to judge Plaintiffs’ claims under § 7(a)(1) is
28 the APA’s “arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law” lens.¹ 5 U.S.C. § 706(2)(A). The case law is clear that Defendants are not required to perform any and/or all conservation measures recommended by Plaintiffs or anyone else, for that matter, even the expert agencies. *See Pyramid Lake Paiute Tribe*, 898 F.2d at 1417. Defendants presented evidence of many actions they have undertaken and are undertaking for the conservation and benefit of caribou and other endangered species within the IPNF. The Court concludes Defendant Forest Service has not abused its discretion or acted in an arbitrary or capricious manner in fulfilling its § 7(a)(1) obligations.

B. ESA §7(a)(2)

Section 7(a)(2) of the ESA imposes a substantive duty in addition to its procedural consultation requirement. *Defenders of Wildlife v. EPA*, 420 F.3d 946, 950, 957 (9th Cir. 2005). Federal agencies must “‘insure’ that [agency] actions are ‘not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.’” *Id.* at 950-51 (quoting 16 U.S.C. § 1536(a)(2)). Section 7(a)(2) therefore “includes an affirmative grant of authority to attend to protection of listed species within agencies’ authority when they take actions covered by section 7(a)(2).” *Id.* at 965. This grant of authority has been characterized as a “do-no-harm obligation” on agencies when their own actions could cause harm to an endangered species. *Id.* When consultation occurs, agencies must still operate “under the assumption that all of section 7(a)(2)’s substantive requirements apply to the action agency.” *Id.* at 966.

The Forest Service and FWS have reinitiated consultation in accordance

¹ Under the deferential arbitrary and capricious standard, the Court must ask “whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made.” *Pacific Coast Fed’n of Fishermen’s Assoc. v. Nat’l Marine Fisheries Svc.*, 265 F.3d 1028, 1034 (internal quotation marks and citation omitted).

1 with § 7(a)(2) of the ESA. While consultation is ongoing, § 7(d) of the ESA
2 provides additional guidance regarding the activities the Forest Service may
3 permit. Section 7(d) of the ESA states:

4 After initiation of consultation required under subsection (a)(2), the
5 Federal agency and the permit or license applicant shall not make any
6 irreversible or irretrievable commitment of resources with respect to
7 the agency action which has the effect of foreclosing the formulation
8 or implementation of any reasonable and prudent alternative measures
9 which would not violate subsection (a)(2) of this section.

10 16 U.S.C. § 1536(d). This section was “enacted to ensure that the status quo would
11 be maintained during the consultation process, to prevent agencies from sinking
12 resources into a project in order to ensure its completion regardless of its impacts
13 on endangered species.” *Wash. Toxics Coalition*, 413 F.3d at 1034-35. Section
14 7(d) does not replace the requirements found in § 7(a)(2); rather, it “clarifies” those
15 requirements. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 n.14 (9th Cir.
16 1994) (citation omitted).

17 In *Washington Toxics Coalition*, the Ninth Circuit held the burden of
18 establishing that an action is non-jeopardizing pending the completion of
19 consultation is on the agency. *Id.* at 1035. “Placing the burden on the acting
20 agency to prove the action is non-jeopardizing is consistent with the purpose of the
21 ESA and what we have termed its ‘institutionalized caution mandate[].’” *Id.*
22 Accordingly, it is Federal Defendants’ burden to prove that continuing to permit
23 snowmobiling within the caribou recovery area is non-jeopardizing to the species.

24 The issue, therefore, is whether the current operation of the IPNF “insures”
25 the authorization of snowmobiling is not likely to jeopardize this population. To
26 “jeopardize the continued existence of a species” means “to engage in an action
27 that reasonably would be expected, directly or indirectly, to reduce appreciably the
28 likelihood of both the survival and recovery of a listed species in the wild by
29 reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. §
30 402.02.

31 As discussed in the Court’s findings of fact above, Defendants have not

1 carried this burden as to the entire recovery area. The Court finds that
2 snowmobiling in the vicinity of caribou and within and around areas of high
3 quality Late Winter habitat jeopardizes the survival and recovery of the woodland
4 caribou. It affects and reduces the distribution of the species and the opportunities
5 to breed among animals located in the northern and southern areas of the recovery
6 area. Snowmobiling in prime winter habitat dislocates caribou from normal
7 feeding in a time of nutritional deficit and contributes to their already depleted
8 physical condition. It is clear that caribou still inhabit IPNF land, even though the
9 numbers are regrettably small. Caribou have been recently sighted close to federal
10 land in areas that are not currently closed to snowmobiling. The evidence clearly
11 supports a finding that interaction between snowmobiles and caribou is harmful to
12 the animals. At this population level, any harm even to a single animal could place
13 the entire population in jeopardy. Accordingly, to insure no jeopardy, the areas
14 closed or limited by the Court's most recent injunction shall remain closed or
15 otherwise limited, as shall the travel corridor between the Selkirk Crest closed area
16 and points north.

17 **C. ESA § 9**

18 Section 9 of the ESA makes it a crime to "take" any species listed as
19 endangered. 16 U.S.C. § 1538(a)(1)(B). The term "take" is defined broadly to
20 mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to
21 attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The term "harm"
22 as used in the ESA includes any "significant habitat modification or degradation
23 where it actually kills or injures wildlife by significantly impairing essential
24 behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.
25 This definition includes "significant . . . modification or degradation" of a listed
26 species' habitat. *See Babbitt v. Sweet Home Chapter of Cmities. for a Great Or.*,
27 515 U.S. 687, 691, 708 (1995) (upholding definition of "harm" in 50 C.F.R. §
28 17.3). The term "harass" in the definition of "take" means "an intentional or

1 negligent act or omission which creates the likelihood of injury to wildlife by
2 annoying it to such an extent as to significantly disrupt normal behavioral patterns
3 which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. §
4 17.3. The anti-take provisions of § 9 apply to all actors, not just the federal
5 government. *Defenders of Wildlife v. EPA*, 420 F.3d at 975. Section 9 protection
6 for endangered and threatened species is not considered as broad as that provided
7 in § 7 because “the Government cannot enforce the § 9 prohibition until an animal
8 has actually been killed or injured.” *Sweet Home*, 515 U.S. at 703. This “after-the-
9 fact enforcement” does not prevent threats to listed species; that task is
10 accomplished through § 7. *Defenders of Wildlife v. EPA*, 420 F.3d at 975.

11 The Court finds the evidence supports its conclusion that “take” in the form
12 of harassment and harm has taken place in the past and is very likely to take place
13 in the future unless areas of high quality Late Winter habitat and an area
14 surrounding the travel corridor are closed to snowmobiling. The Supreme Court
15 has found that “harm” to an endangered species “may include significant habitat
16 modification or degradation where it actually kills or injures wildlife by
17 significantly impairing essential behavioral patterns, including breeding, feeding,
18 or sheltering.” *Sweet Home*, 515 U.S. at 691 (quoting 50 C.F.R. § 17.3 (1994)).
19 The Ninth Circuit has found in the context of habitat degradation that an activity
20 may constitute a violation of § 9 even though the harm is indirect and prospective,
21 although Plaintiffs must show ““significant impairment of the species’ breeding or
22 feeding habits and prove that the habitat degradation prevents, or possibly, retards,
23 recovery of the species.”” *Ariz. Cattle Grower’s Ass’n v. Fish & Wildlife Serv.*,
24 273 F.3d 1229, 1238 (9th Cir. 2001) (quoting *Nat’l Wildlife Fed’n v. Burlington*
25 *N.R.R.*, 23 F.3d 1508, 1513 (9th Cir. 1994)).

26 Here, Plaintiffs have shown that continued snowmobiling within the area
27 subject to the current injunction as well as the travel corridor prevents, or at the
28 very least, retards, recovery of the woodland caribou within the United States. As

1 previously found, snowmobiling degrades the Late Winter habitat which
2 significantly impairs the feeding and breeding habits of caribou and which has in
3 the past resulted in actual injury to animals within the IPNF. Evidence supports
4 the conclusion that this type of harm and harassment is very likely to occur again
5 in the future should snowmobiling be permitted in the areas now subject to the
6 current injunction in addition to the travel corridor. Therefore, the Court enjoins
7 snowmobiling in this area pending the completion of consultation to prevent future
8 violations of § 9 of the ESA.

9 SCOPE OF INJUNCTION

10 Pursuant to Federal Rule of Civil Procedure 65(d), the Court must tailor the
11 relief ordered. Fed. R. Civ. P. 65(d) (stating the order “shall be specific in terms;
12 [and] shall describe in reasonable detail . . . the act or acts sought to be
13 restrained”). As stated above, the Court has found that the habitat caribou *can*
14 occupy is relevant both for the recovery of the species (long term) and for the
15 interim consultation period (short term). The Court finds the closure of other high
16 quality habitat is necessary to insure no jeopardy and to prevent future take under §
17 7(a)(2) and § 9 of the ESA. The Court’s most recent injunction, as described in its
18 November 7, 2006 Order (Ct. Rec. 140), remains in place to achieve these goals.
19 In addition, the evidence reflects a necessity for a travel corridor available for
20 movement through the Trapper Burn area, which is currently open as a
21 snowmobile “play area” until April 1. Therefore, the Court extends the injunction
22 closure through a corridor that extends 2 kilometers on either side of the watershed
23 throughout the length of the Trapper Burn play area.

24 The Court recognizes that drawing lines is always difficult, and it asked the
25 parties as the most knowledgeable about the landscape of the Trapper Burn area to
26 confer to propose suitable boundaries for the closed area. The parties could not
27 agree on a proposal, and so submitted two proposals for the Court’s consideration
28 at a telephonic hearing on February 22, 2007 (Ct. Recs. 173 & 174). Lauren Rule,

1 Michael Leahy, and Richard Eichstaedt appeared on behalf of Plaintiffs; Joseph
2 Kim appeared on behalf of Defendants; and Paul Turcke appeared on behalf of
3 Defendant-Intervenors.

4 Plaintiffs' proposal is based in part on evidence not presented at trial and is
5 not wholly consistent with the evidence that was presented. They ask for a four-
6 kilometer-wide area that is bordered on the east by the ridge line that marks the
7 boundary between Idaho State land and the IPNF and that falls completely within
8 the IPNF (Ct. Rec. 174). The Court based its decision to close a four-kilometer
9 wide corridor on its understanding of the rebuttal testimony of Plaintiffs' expert
10 Keith Simpson, who testified that caribou follow the height of land in their
11 movements during the Late Winter season. The Court found that the center of the
12 corridor is the ridge line, and its ruling provides a two kilometer buffer on each
13 side of the ridge line. Defendants' proposal using the ridge line as the center point
14 more accurately reflects the Court's intent to create a corridor surrounding that
15 height of land (Ct. Rec. 173). Moreover, the existence of another route to the east
16 of the closed corridor used by caribou to migrate north and south, as some defense
17 experts described in their testimony, is significant to the Court' delineation of the
18 corridor.

19 The Court recognizes that a part of the Court's proposed closed area falls on
20 Idaho State land and as such is outside the area over which Defendants exercise
21 jurisdiction. Nevertheless, the Court believes Defendants' proposal is supported
22 by the evidence and most accurately reflects the Court's intentions. The Court
23 expects Defendants, as members of the international, interagency Woodland
24 Caribou Recovery Team with agencies from British Columbia, Washington, and
25 Idaho, to encourage other member agencies to modify their own policies to best
26 protect and conserve the species in a manner consistent with the Court's Order.

27 Accordingly, for the foregoing reasons, **IT IS HEREBY ORDERED:**

28 1. Plaintiffs' claim under § 7(a)(1) of the ESA for the IPNF is **DISMISSED**

1 and judgment is granted in favor of Defendants.

2 2. Plaintiffs' claims under § 7(a)(2) and § 9 of the ESA for the IPNF are
3 **GRANTED** and judgment is granted in favor of Plaintiffs.

4 3. The injunction as outlined in the Court's November 7, 2006 Order (Ct.
5 Rec. 140) **remains in place**. This injunction is further modified with the closures
6 outlined in Defendants' Proposed Permanent Injunction Order (Ct. Rec. 173).
7 Defendants shall **file a final map and closure order** corresponding with their
8 proposal on or before **February 27, 2007**.

9 4. This injunction will remain in effect until the completion of Defendant
10 IPNF's consultation with Defendant Fish and Wildlife Service and their release of
11 a Winter Recreation Strategy, in compliance with § 7(a)(2) of the ESA.

12 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
13 enter this Order and furnish copies to counsel.

14 **DATED** this 26th day of February, 2007.

15 *s/ Robert H. Whaley*

16 ROBERT H. WHALEY
17 Chief United States District Judge

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